MORAN, RAIMI, GOETHEL & KARNANI, P.C.

ATTORNEYS AND COUNSELORS AT LAW

DIANA RAIMI
STEPHEN GOETHEL
ACHLA B. KARNANI
CHAD D. ENGELHARDT

320 NORTH MAIN STREET, SUITE 101
ANN ARBOR, MICHIGAN 48104
(734) 769-6838
FACSIMILE (734) 769-7935

MICHAEL C. MORAN, Retired

May 18, 2012

Michigan Senate Insurance Committee

Re: SB 1115, 1116, 1117, 1118 & 1110
Analysis of SB 1115

Dear Senate Insurance Committee Member:

I write to express my concern and strong objection over the proposed sweeping changes to the law regarding medical malpractice cases contained in SB's 1110, 1115, 1116, 1117 & 1118 .

I will limit my comments to various aspects of SB 1115, a bill that is exceedingly complex, poorly worded and in many respects extraordinarily vague. The goal of SB 1115 is, however, abundantly clear – to further curtail, restrict and/or eliminate the rights of those injured or killed by medical negligence or wrongdoing; rights that are already among the most restricted of any class of citizens in this state.

To assist in evaluating my opinions and comments I provide the following context. I have been in practice for 32 years. I started my career as an assistant prosecutor for L. Brooks Patterson in Oakland County. I have been litigating medical malpractice cases close to 30 years now; some of that time defending doctors at institutions such as the University of Michigan. Without question the vast majority of my work has been prosecuting cases on behalf of patients. My interest in medical malpractice work evolved out of a deep respect for medicine, a passionate interest in the law and a fascination with the interface between the two. I have maintained an AV (highest) rating for legal ability and ethics through Martindale Hubble for the last 20 years. I am listed in Best Lawyers in America for medical malpractice law and have been designated as a Michigan Super Lawyer and one of Metro-Detroit's Top Lawyers in this field as well. I have taught and lectured for the Institute of Continuing Legal Education (ICLE) and the Michigan Association of Justice.

Over my years in practice I have watched the on-going evolution of medical malpractice law in the this state; from the so-called "tort reform" of 1986 and then again in 1994, to the ensuing litany of appellate decisions over the intricacy and complexity of those statutory changes, to the now byzantine procedural requirements just to bring a malpractice case in Michigan, let alone take one to trial. I have watched the number of malpractice cases filed each year dwindle and the number of lawyers willing to prosecute these cases diminish year after year. I have seen the impact of the "tort reform" laws on victims of medical malpractice, a great many of whom no longer receive representation because the economics of litigating a medical

malpractice case make it impossible to advocate for and represent them. And now this, the bills under your consideration.

Make no mistake, the purpose behind SB1115 is not to put "patients first," to stop Michigan from "hemorrhaging physicians," or protecting citizens from trial lawyers "artificially inflating awards."[1] Rather the legislation addressed in SB1115 is designed to gut and limit significant elements of damage so severely that the cause of action for medical malpractice in Michigan in many instances would be effectively be eliminated, leaving victims of malpractice – whose rights are already severely limited – without legal recourse whatsoever.

Section 1483: Household/other services made non-economic damage subject to cap

Section 1483(3), (p2: 18-20) would legislatively overrule *Thorn v Mercy Memorial Hospital,* 281 Mich App 644, 647; 761 NW2d 414 (2008) and an entire body of law in the State of Michigan *for medical malpractice cases only.* It would make any claim for loss of household service or other service a non-economic damage and therefore subject to "damage cap" limits. To understand what a radical departure this represents from the settled law in Michigan the background in *Thorn* becomes relevant.

Thorn involved a wrongful death case arising from medical malpractice. Defendants sought to preclude any claims for loss of services as an economic damage. The Court reviewed the language of MCL 600.1483 that requires a separation of damages between those that are economic and those that are non-economic. The Court further noted that the specifics of this distinction were not fully delineated in the statute. The Court reviewed the history of damages compensable under the Wrongful Death Act (WDA). The Court also looked at other statutes in the revised judicature act that address the subject and provide that loss of services are recoverable as a "pecuniary injury." Citing MCL 600.2945 relating to product liability cases, the Court noted:

> Economic loss means objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, *costs of obtaining substitute domestic services,* loss of employment, *or other objectively verifiable monetary losses.*
>
> *Thorn* at 664-665, emphasis added

The Court went on to note that it would be absurd to define the nature of the damages based on the theory of liability asserted.

> Although the damages recoverable under the WDA are determined by the underlying action, it is nonsensical to construe the nature or character of those damages as being variable depending on the theory of liability. *What comprises an economic loss in a medical malpractice action must be the same as what constitutes an economic loss under a different theory of tort liability. To find*

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[1] Senator Roger Kahn Press Release May 3, 2012

otherwise would be not only confusing, but also would lead to inconsistent and inequitable results when an injury is fatal.

Thorn at 665, emphasis added

Other aspects of Michigan law specifically identify loss of household services – or replacement services – as an *economic damage* and place a value on it. MCL 500.3135 of the No Fault Law allows for third party recovery of these damages when they exceed the statutory maximums along with excess wage loss, as *economic damage*.

The Michigan Standard Jury Instructions have long included instructions for determining damages for loss of services when there is evidence of compensable expense such as care-taking and child care. M Civ JI 50.08

That household/other services represent a "pecuniary injury" cannot be credibly disputed. Household services are routinely evaluated by economists and researchers in the labor market in an objectively verifiable, monetary manner. Just this month studies in two publications announced the results of annual surveys on the economic value of Mothers in the household – both stay-at home and for those who work. A May 2012 article in *Forbes* determined the annual value of a stay-at-home Mom at $115,000 down $2,000 from last year. A similar study in the May 7, 2012 edition of *Business Insider* placed that value at $112,962. Economists have long been able to determine the economic value of household services, as does the government of the United States, the IMF (International Monetary Fund) and the United Nations.

To say that the survivors of a wife and mother of 4, who was home-schooling her children and killed by medical wrong-doing have not suffered an economic loss of the mother's services is absurd. Nevertheless, SB1115 would do just that.

The sponsor of SB1115 has promoted this legislation on the premise that trial lawyers are "artificially inflating awards," by establishing the economic value of services in the household; services that are provided by mothers, fathers or other family members. These claims are intellectually dishonest, to say the least. Under this proposed legislation only the victims of medical malpractice would singled out and treated in this fashion.

<u>Section 6306(2)</u>: discounting to present value changed from simple to compound

This section (p4: 8-9) relates to the determination of future damages and the requirement that they be reduced to present value. The proposed legislation would amend the current 5% rate for reduction to present value to a 5% *annually compounded* rate. These changes apply to both personal injury actions and those for medical malpractice. See, section 6306A(4) p6: 14-18. Ironically, the impact of the change to annual compounding would be most dramatic for those who are seriously and permanently injured with longer life expectancies. In other words, those who have been injured and damaged the most.

A simple example is telling. Assume a serious, permanent injury where the jury decided to award $25,000 per year for 40 years for a total of $1,000,000. Under the current 5% simple discount rate, the total after reduction to present value is $541,065. That same amount under the proposed compound discounting winds up reduced to $428,977, a 57% reduction in value; another 11% over the current formulation.

One would think, someone awarded more, would receive more. Yet under the proposed change, someone awarded less, for a shorter future period *would actually receive more.* For example, someone awarded $750,000 for care needed over a period of 20 years would receive close to $40,000 more than a victim awarded $1,000,000 for care needed over 40 years. *See,* exhibit A.

As with damage caps, the proposed legislation fails to account for the realities of modern day life that would look at market rates not arbitrarily determined values. Sections 6306(2) and 6306A(4) represent nothing more than an effort to single out those with ongoing life-long injury and damage and further restrict their right to be made whole.

Section 6306A

6306A is a new section that applies only to medical malpractice actions and creates an entirely new layer of post-verdict "adjustments" to be made in calculating the amount of damages when entering judgment. To label the provisions confusing and complex would be an understatement. Virtually every attorney I have asked to review these provisions the first time through was left clueless what they actually meant.

Sections 6306A(1)(B) & (E): past/future ratio reductions

6306A(1)(B) provides that past non-economic damages are to be reduced according to the damage caps per section 1483. It goes on, however, to provide that Court must calculate "a ratio between past non-economic damages and future economic damages" and must then "allocate the amounts to be deducted proportionally between the past and future non-economic damages" in rendering judgment. How the future non-economic damage component is to be determined in order to calculate this "ratio" is not defined or explained. Is it the gross future non-economic damages? One that is discounted? Based on capped damages? 6306(1)(B) says nothing about these matters.

A potential clue is found two sections later in Section 6306(1)(E) which describes the manner of entering judgment on future non-economic damages. This section mandates that "all future non-economic damages" are to be reduced to the newly defined "gross present cash value." It likewise requires the Court to generate a ratio of past to future non-economic damages and then mandates the Court to deduct proportionally between past and future non-economic damages in entering the amount of future non-economics. The confusion begins in the first sentence of the section which requires not only reduction to "gross present cash value" but as well a reduction to the damage cap limitations of section 1483. Is the ratio calculated before reduction to present value or after reduction? Is the ratio calculated before or after reduction to present value and before or after imposition of the damage caps? 6306A(1)(E) (and, by implication section 6306A(1)(B)) say nothing about these issues.

Non-economic damages in malpractice cases are already artificially capped without regard to categorization as past or future damages. Creating a ratio of past to future damages in order to make even further reductions to what is already limited is found in multiple sections of 6306A aside from subsections (1)(B)&(E). See, *e.g.* Section 6306A(2) (deductions for plaintiff's assignment of fault) and 6306A(3) (reductions for settlements from other tortfeasors). All these provisions contain the mandate to create a ratio reduction in determining total past and future damages.

The apparent logic behind these mind-boggling "adjustments" to what the jury actually decided were appropriate damages surfaces in 6306A(3) which provides:

> When reducing a judgment amount under this subsection, the Court shall perform the reduction before awarding any interest provided by law, but after making all other required adjustments to the verdict, including those required by this section and by section 1483.

Thus, one could argue that the ratio reduction of past and future non-economic damages is intended to prevent a court from assigning the entirety of a jury's verdict for non-economic damages that exceeded the damage cap to past non-economic damages allowing the plaintiff to recover judgment interest on the entire capped award versus some lesser amount determined by 6306A's ratio reduction methodology. Given that the interest on money judgments is currently running at a miserly 2.083% percent, given that non-economic damages are already highly limited in medical malpractice cases, it is hard to understand how these provisions will do anything to achieve the proposed legislation's stated goal of protecting patients or any of the other asserted justifications.

Section 6306(A)(1)(D) Elimination of the collateral source rule for future medical expenses

This provision, p5: 9-11, abrogates the common law collateral source rule for future medical expenses, a feature of Michigan's *juris prudence* for over a century. Instead of the stability and accountability inherent in the current rule, the proposed legislation gives negligent wrongdoers an offset for future medical care which may be paid for by health care insurance or Medicare. This effectively provides a form of economic immunity for a wrongdoer who injures a person carrying health insurance. It gives the wrongdoer the benefit of the innocent injured person's premiums and penalizes people for having health insurance. This provision does nothing to promote safety; instead it fosters negligence. This is clearly contrary to good public policy.

Currently, and in non-malpractice cases under the proposed changes, *MCL 600.6306(1)(c) specifically excludes future medical and other health care costs from collateral source reduction.* The common law collateral source rule continues to apply to future medical damages and plaintiff can recover their full value.[2] The common law collateral source rule provides that any benefits received by an injured party from a collateral source will not serve to reduce the damages otherwise recoverable from the wrongdoer.[3] Our Courts explained that the rationale for such application of the collateral source rule as follows:

> To allow the defendant to reduce his liability because the plaintiffs exercised a contract right of recovery against their insurer, a right for which the plaintiffs paid

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[2] *Amlotte, et. al. v United States, 292 F.Supp.2d 922* (2003, E.D. Mich), *Bender v Farmington Ridge*, unpublished per curiam opinion of the Court of Appeals, Docket No. 208545 (September 8, 2000), *Libbrecht v Marshall Medical Associates*, unpublished per curiam opinion of the Court of Appeals, Docket No. 176354 (October 4, 1996).

[3] See *Perrott v Shearer*, 17 Mich. 48 (1868), *Motts v Michigan Cab Co*, 274 Mich. 437, 443-446; 264 NW 855 (1936), *Blacha v Gagnon*, 47 Mich.App. 168 (1973).

consideration in the form of premiums, would be an unjust enrichment of the defendant.[4]

Further, it is common knowledge that the coverage provided under many health insurance plans has been cut dramatically over the last decade in a continuing trend. A procedure that may be covered by insurance today may not be covered in the future. More importantly, the injured party may not even have insurance in the future. They may lose their job due to their medical condition or other factors, their employer may go out of business or stop offering coverage, or the person could reach the lifetime coverage cap. Under the proposed legislation, the injured person makes no recovery for the care they need, and the negligent parties skate with a free pass granted by a legislature.

The impact of this proposed provision is particularly unjust given the expected changes in Medicare regulations to establish set-asides in liability cases. When that happens, an injured person who carries insurance or is a Medicare beneficiary could be precluded from recovering from the negligent party, yet still have to forfeit a portion of the verdict in order to maintain their eligibility for future benefits.

Section 600.6306(A)(3) Set-offs from prior settlements taken from judgment

This provision, p6:1-13, is intended to further limit the amount a plaintiff may recover in a multi-defendant case where some of the wrongdoers accept responsibility and settle before trial. This legislation would reverse the Court of Appeals decision in *Velez v Tuma*, 283 Mich App 396 (2009), *lv gtd,* 488 Mich 903 (2010). If adopted, set-offs would be taken *after* the damage caps of §1483 are applied. In other words, set-offs for prior settlement would be deducted from the judgment amount, not the jury's verdict.[5]

The proponents of the Bills falsely claim that the current order of set-offs allow for a "double recovery." In reality, nothing could be further from the truth, what they are after is a double reduction, a legislative free pass that would discourage settlements and increase litigation. An injured person that a jury determines has suffered millions of dollars in human losses cannot logically be said to have made any "double recovery" until the amount of the jury *verdict* is exceeded, not an arbitrary cap imposed to protect doctors, hospitals and their insurance companies.

In addition to being a flawed solution to a non-existent problem, and one which fosters increasingly expensive litigation vs. efficient settlement of claims, the proposed legislation creates a whole new set of issues in the allocation of settlements. Unlike a jury's verdict, which by operation of §1483(2) must be segregated by *the trier of fact* into economic and non-economic recoveries, settlements are customarily made *in gross.* Nonetheless, under this bill, the entirety of a prior settlement would be treated as a set-off to non-economic and therefore, capped damages.

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[4] *Beaird v Brown,*58 Ill.App.3d 18, 21; 373 N.E.2d 1055, 1057 (1978).

[5] In fact, there should be no such set-offs in the first place, they were abrogated by the 1996 amendments to MCL 600.2925d, which eliminated the then existing set-off provisions of §2925d(b). Settlement set-offs in malpractice cases are a creation of unwarranted judicial activism in *Markley v Oak Health Care*, 255 Mich App 245 (2003) and should be precluded in the entirety.

Further, the proposal is significantly flawed in that pursuant to 600.6304, there can be either several liability or joint and several liability in medical malpractice cases based on patient fault. Where a patient is found at some percentage of fault, a defendant's liability will be like most other Michigan cases, purely several. As a result, a defendant at trial will be liable only for his own percentage of fault, not for the fault assessed by the jury against another defendant. Yet, section 6306A(3) proposes to make all medical malpractice cases subject to a prior settlement setoff; *even those where liability is determined to be several; not joint and several.* Once again, creating the potential for another legislative free pass for the wrongdoer.

Conclusion: Solutions in search of a problem

In evaluating the breadth of the proposed legislation, not just SB 1115, but the additional bills, this Committee should be asking the question what problem are these measures truly seeking to fix? With malpractice case filings down by some 80%, with indemnity payments down almost as much, how does legislation designed to further reduce or eliminate the already limited rights of those injured by medical negligence and wrong-doing serve to "protect" them? The short answer is simple: it doesn't.

I urge this Committee in the strongest terms possible to oppose these bills. They do nothing to promote the ideal of patient safety in health care. They add layers of complexity to an area of the law already complex. Certainly they will foster endless litigation over their vagaries. They are a bad solution to a non-existent, trumped up problem.

Very truly yours,

Stephen Goethel

Chad Engelhardt

EXHIBIT A

5% Simple vs. 5% Compound Discounting
$1,000,000 at 40 years

Year	Annual Amount	5% Simple	PV	5% Compound	PV
2013	$25,000.00	1.05	$23,809.52	1.05	$23,809.52
2014	$25,000.00	1.10	$22,727.27	1.10	$22,675.74
2015	$25,000.00	1.15	$21,739.13	1.16	$21,483.20
2016	$25,000.00	1.20	$20,833.33	1.22	$20,491.80
2017	$25,000.00	1.25	$20,000.00	1.28	$19,531.25
2018	$25,000.00	1.30	$19,230.77	1.34	$18,656.72
2019	$25,000.00	1.35	$18,518.52	1.41	$17,730.50
2020	$25,000.00	1.40	$17,857.14	1.48	$16,891.89
2021	$25,000.00	1.45	$17,241.38	1.55	$16,129.03
2022	$25,000.00	1.50	$16,666.67	1.63	$15,337.42
2023	$25,000.00	1.55	$16,129.03	1.71	$14,619.88
2024	$25,000.00	1.60	$15,625.00	1.80	$13,888.89
2025	$25,000.00	1.65	$15,151.52	1.89	$13,227.51
2026	$25,000.00	1.70	$14,705.88	1.98	$12,626.26
2027	$25,000.00	1.75	$14,285.71	2.08	$12,019.23
2028	$25,000.00	1.80	$13,888.89	2.18	$11,467.89
2029	$25,000.00	1.85	$13,513.51	2.29	$10,917.03
2030	$25,000.00	1.90	$13,157.89	2.41	$10,373.44
2031	$25,000.00	1.95	$12,820.51	2.53	$9,881.42
2032	$25,000.00	2.00	$12,500.00	2.65	$9,433.96
2033	$25,000.00	2.05	$12,195.12	2.79	$8,960.57
2034	$25,000.00	2.10	$11,904.76	2.93	$8,532.42
2035	$25,000.00	2.15	$11,627.91	3.07	$8,143.32
2036	$25,000.00	2.20	$11,363.64	3.23	$7,739.94
2037	$25,000.00	2.25	$11,111.11	3.39	$7,374.63
2038	$25,000.00	2.30	$10,869.57	3.56	$7,022.47
2039	$25,000.00	2.35	$10,638.30	3.73	$6,702.41
2040	$25,000.00	2.40	$10,416.67	3.92	$6,377.55
2041	$25,000.00	2.45	$10,204.08	4.12	$6,067.96
2042	$25,000.00	2.50	$10,000.00	4.23	$5,910.17
2043	$25,000.00	2.55	$9,803.92	4.54	$5,506.61
2044	$25,000.00	2.60	$9,615.38	4.76	$5,252.10
2045	$25,000.00	2.65	$9,433.96	5.00	$5,000.00
2046	$25,000.00	2.70	$9,259.26	5.25	$4,761.90
2047	$25,000.00	2.75	$9,090.91	5.52	$4,528.99
2048	$25,000.00	2.80	$8,928.57	5.79	$4,317.79
2049	$25,000.00	2.85	$8,771.93	6.08	$4,111.84
2050	$25,000.00	2.90	$8,620.69	6.39	$3,912.36
2051	$25,000.00	2.95	$8,474.58	6.70	$3,731.34
2052	$25,000.00	3.00	$8,333.33	7.04	$3,551.14
40 years	**$1,000,000.00**		**$541,065.38**		**$428,698.13**

5% Simple vs. 5% Compound Discounting
$750,000.00 at 20 years

Year	Annual Amount	5% Simple	PV	5% Compound	PV
2013	$37,500.00	1.05	$35,714.29	1.05	$35,714.29
2014	$37,500.00	1.10	$34,090.91	1.10	$34,013.61
2015	$37,500.00	1.15	$32,608.70	1.16	$32,224.80
2016	$37,500.00	1.20	$31,250.00	1.22	$30,737.70
2017	$37,500.00	1.25	$30,000.00	1.28	$29,296.88
2018	$37,500.00	1.30	$28,846.15	1.34	$27,985.07
2019	$37,500.00	1.35	$27,777.78	1.41	$26,595.74
2020	$37,500.00	1.40	$26,785.71	1.48	$25,337.84
2021	$37,500.00	1.45	$25,862.07	1.55	$24,193.55
2022	$37,500.00	1.50	$25,000.00	1.63	$23,006.13
2023	$37,500.00	1.55	$24,193.55	1.71	$21,929.82
2024	$37,500.00	1.60	$23,437.50	1.80	$20,833.33
2025	$37,500.00	1.65	$22,727.27	1.89	$19,841.27
2026	$37,500.00	1.70	$22,058.82	1.98	$18,939.39
2027	$37,500.00	1.75	$21,428.57	2.08	$18,028.85
2028	$37,500.00	1.80	$20,833.33	2.18	$17,201.83
2029	$37,500.00	1.85	$20,270.27	2.29	$16,375.55
2030	$37,500.00	1.90	$19,736.84	2.41	$15,560.17
2031	$37,500.00	1.95	$19,230.77	2.53	$14,822.13
2032	$37,500.00	2.00	$18,750.00	2.65	$14,150.94
20 years	**$750,000.00**		**$510,602.54**		**$466,788.90**